No. 94-490

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE *AMICI CURIAE* ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS; CORPORATION FOR PUBLIC BROADCASTING; IOWA PUBLIC BROADCASTING BOARD; NEBRASKA EDUCATIONAL TELECOMMUNICATIONS COMMISSION; ORGANIZATION OF STATE BROADCASTING EXECUTIVES; PUBLIC BROADCASTING SERVICE; AND SOUTHERN EDUCATIONAL COMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Iowa Public Broadcasting Board ("Iowa PTV"), the Nebraska Educational Telecommunications Commission ("NETC"), the Organization of State Broadcasting Executives ("OSBE"), the Public Broadcasting Service ("PBS"), and the Southern Educational Communications Association ("SECA") respectfully move for leave to file the attached Brief *Amici Curiae* in this case. Although counsel for petitioners has consented to the filing of this brief, Respondent, Ralph P. Forbes, has not granted his consent, necessitating this motion for the Court's indulgence.

The *Amici Curiae* are public broadcasting entities that share a common interest in protecting broadcasters licensed to state or local government entities from inappropriate judicial intrusion into their editorial decisions. APTS and PBS are non-profit membership organizations whose members are the licensees of most of the nation's

public television stations. APTS is the national representative of these licensees, presenting their views before Congress and federal regulatory agencies, as well as in judicial proceedings. PBS is the national program distribution arm of these licensees, providing a variety of program and program-related services to its members and others.

CPB is the private non-profit District of Columbia corporation organized pursuant to the Public Broadcasting Act of 1967, as amended, for the purpose of facilitating the development of public broadcasting in the United States. *See,* 47 U.S.C. § 396 et seq. CPB provides program funding and operational support to public broadcast stations, many of which are licensed to state and local government entities.

OSBE is an organization of the chief executive officers of 31 statewide public broadcasting entities. OSBE was formed to address the common concerns of these executives, including the manner in which state licensees exercise the editorial judgment entrusted to them by the Communications Act.

SECA is a non-profit regional association of public radio and television stations that provides programming and other services to its members in 17 states, the U.S. Virgin Islands and Puerto Rico.

Iowa PTV is the state agency to which the eight public television stations that make up the Iowa public television network are licensed. This case directly affects Iowa PTV, which was a party to *DeYoung v. Patten,* 898 F.2d 628 (8th Cir. 1990), a decision by a panel of the Eighth Circuit that was overruled in part by the decision below. Under *DeYoung v. Patten,* Iowa PTV enjoyed the same freedom as private broadcast licensees to exercise editorial discretion in selecting the participants in its candidate debates and other programs.

NETC is an agency of the State of Nebraska and is the licensee of eight of the nine public television stations and the nine public radio stations which make up the Nebraska state public television and radio networks.

Those networks provide public broadcast service to the residents of the State of Nebraska. Since Nebraska is part of the Eighth Circuit, the decision below directly and immediately affects NETC's programming discretion and its ability to operate its public broadcast stations.

As described in the accompanying brief, the ramifications of the decision below extend far beyond the particular concerns of the Arkansas Educational Television Commission, which operates five of the 133 public television stations nationwide that are licensed to state or local governmental instrumentalities. The *Amici Curiae,* most of whom participated below, would seek to apprise this Court of the impact of the Eighth Circuit's decision on the licensees of the 230 public radio and television stations throughout the country operated by state and local government entities. As the representatives of national public television organizations, state broadcast networks and providers of much of the national and regional programs broadcast by public television stations, the *Amici* are uniquely able to apprise the Court of the system-wide implications of the court of appeals' decision.

Respectfully submitted,

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ISSUES PRESENTED

This case presents an issue of first impression for this Court as to the appropriate roles of the courts and the Federal Communications Commission ("FCC" or "Commission") in resolving First Amendment challenges to programming decisions of broadcast stations licensed to state or local government instrumentalities. The case also raises important issues concerning the inter-relationship between the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq., and the First Amendment of the United States Constitution. The specific issues raised by the decision below are:

1. Whether a disgruntled candidate may by-pass the FCC and proceed directly in federal court to challenge, on First Amendment grounds, a state broadcast network's journalistic judgment in selecting the participants in a candidate debate?

2. Whether a state broadcast network may be required, consistent with the First Amendment and the editorial responsibilities imposed on broadcasters by the Communications Act, to justify its programming decisions on a "viewpoint-neutral" basis?

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The Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Iowa Public Broadcasting Board ("Iowa PTV"), the Nebraska Educational Telecommunications Commission ("NETC"), the Organization of State Broadcasting Executives ("OSBE"), the Public Broadcasting

Service ("PBS"), and the Southern Educational Communications Association ("SECA") urge the Court to grant the Petition for Certiorari filed in the above-captioned case by the Arkansas Public Television Commission ("AETC"). AETC seeks review of a decision that is inconsistent with the decisions of this Court and other courts of appeals and with the statutory scheme of the Communications Act of 1934, as amended. 47 U.S.C. § 151, et seq. The decision will deter not only AETC but also many other public broadcasters from presenting candidate debates and other programs addressing controversial issues of public importance.

INTEREST OF *AMICI CURIAE*

As described more fully in the accompanying Motion for Leave To File a Brief, the *Amici Curiae* are public broadcasting entities that share a common interest in protecting the editorial discretion of state and local government broadcast licensees to determine how best to serve the diverse needs of their communities. State and local government broadcasters represent nearly 38% of the nation's public television stations and 16% of its public radio stations, and any intrusion upon their editorial freedom, such as sanctioned by the decision below, has repercussions for the entire national public broadcasting system.

Under the decision below, broadcast stations licensed to state or local government entities may limit the participants in debates between candidates for elective office produced by the station only if they have a "rational and viewpoint-neutral justification" for not inviting the candidates excluded from the debate. 22 F.3d at 1430. For the nation's 230 public broadcast stations licensed to state and local governmental instrumentalities,[1] this holding

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[1] In the interest of conciseness, references hereafter to state entities or instrumentalities will include local government licensees as well.

opens the door to judicial scrutiny not only of programmining decisions about candidate debates, but also, by extension, of virtually any programming decision that involves the presentation of diverse views. This prospect inevitably will deter many of those licensees from carrying the kinds of in-depth news and public affairs programming envisioned by Congress when it enacted the Public Broadcasting Act of 1967, P.L. 90-129, 81 Stat. 365.

STATEMENT OF THE CASE

The *Amici Curiae* adopt the Statement in the Petition for Certiorari.

SUMMARY OF ARGUMENT

AETC seeks review of a decision of the United States Court of Appeals for the Eighth Circuit that needlessly and inappropriately enmeshes the courts in the editorial decisions of broadcast stations licensed to state instrumentalities. The court permitted Mr. Forbes to by-pass the FCC, the expert agency charged with balancing the rights of candidates, broadcasters and the public within the constitutionally sensitive framework of the Communications Act, and to proceed directly in federal court to enforce an asserted First Amendment right of access to a particular program broadcast by AETC.

Unless reversed, this decision would give any candidate not invited to participate in a debate sponsored and/or broadcast by a public broadcast station licensed to a state entity, including *Amici Curiae* Iowa PTV and NETC, the right to ask the federal courts to second-guess the broadcaster's decision. Further, the rationale of the decision below would apply to almost any programming decision a state broadcaster might make and subject the broadcaster to suit by anyone who disagrees with its decision. As this Court has recognized, the operation of a broadcast station necessitates editorial decisions based on content, and it therefore would be exceedingly difficult for the

state broadcaster to justify its programming decision under the "viewpoint-neutral" standard enunciated by the court.

In reaching its holding, the Eighth Circuit applied the First Amendment in a way that is fundamentally inconsistent with the comprehensive regulatory scheme of the Communications Act and with the decisions of this Court interpreting the First Amendment in the broadcast context. The Communications Act embodies Congress' decision that the public interest is best served by affording local broadcasters broad editorial discretion to select the programming responsive to the needs and interests of their communities.

The court's failure to require Mr. Forbes to exhaust his administrative remedies under the Communications Act ignores the teachings of this Court as to the proper role of the FCC in resolving disputes concerning candidate access to the broadcast media. Although the courts are the ultimate arbiters of constituional rights, FCC consideration of the constitutional issues raised by Mr. Forbes would provide the court with the benefit of the FCC's expertise in balancing the First Amendment rights of candidates, broadcasters and the public within the framework of the Communications Act. Commission resolution of Mr. Forbes' claim might also have permitted the court to avoid addressing the constitutional issue.

REASONS FOR GRANTING THE WRIT

This case raises issues concerning the proper role of the federal courts in addressing claims that a broadcast station licensed to a state entity has violated the First Amendment by denying a candidate access to a particular program produced by the licensee. The Eighth Circuit held that, notwithstanding Section 315 of the Communications Act, 47 U.S.C. § 315, which provides for FCC consideration of such claims, a political candidate who was not invited to participate in a debate may by-pass that expert agency and file suit directly in district court to compel

the broadcaster to alter the program in order to include him. In such an action, the broadcaster bears the burden of demonstrating that its decision not to invite the candidate was made on a "rational and viewpoint-neutral" basis. 22 F.3d at 1430.

In so ruling, the Eighth Circuit reached a result that is contrary to the holdings of every other court of appeals that has considered this issue, that is inconsistent with this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS v. DNC*"), and that will involve the federal courts deeply in the programming decisions of broadcast stations licensed to state instrumentalities. While the decision below involved a candidate debate, deciding who will participate in a debate is no different from any other programming decision that broadcasters make on a daily basis. Indeed, content-based decisions about program formats, participants, subject matter and editorial perspective are precisely the types of programming judgments that Congress has insisted all broadcasters *must* make as public trustees under the Communications Act. *See, e.g., Muir v. Alabama Educational Television Com.*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983); *Chandler v. Georgia Public Telecommunications Com.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991).

I. THE DECISION BELOW WILL THRUST THE COURTS DEEPLY INTO THE EDITORIAL DECISIONS OF STATE BROADCAST LICENSEES.

A. A "Viewpoint-Neutral" Programming Requirement Is Fundamentally Incompatible With The Role Of Broadcasters And Will Embroil The Courts In Disputes That Are Not Suited To Judicial Resolution.

The Eighth Circuit held that "since Forbes was a member of the class of speakers for whose benefit the debate was held . . . and wished to address the topic encompassed

by the debate," AETC could exclude him from the debate only on the basis of "viewpoint-neutral" considerations. 22 F.3d at 1429-30. This standard cannot be reconciled with the operation of a broadcast station and will draw the courts into disputes that are ill-suited to judicial resolution.

While viewpoint neutrality may seem like an inoffensive requirement, it is extremely onerous when applied in the broadcast context. The selection of debate participants, like any other programming decision, unavoidably requires consideration of the views espoused by the participants, their importance vis-a-vis those of other candidates, the constituency for the various views in the general public, and other factors that are not "viewpoint neutral." Unless a licensee abandons editorial control over its coverage of political campaigns and allows every candidate for elective office—major and minor party candidates, independent and fringe candidates, and write-in candidates alike—to use its facilities, the licensee must exercise its news judgment as to the kind of debate that would be most informative and of greatest interest to viewers. Allowing candidates of every conceivable stripe and probability of electoral success to use a broadcaster's air may yield a multiplicity of views, but unless those views are presented in a format that makes them accessible, understandable and relevant, it does nothing to further an informed public.

Moreover, it is far too simplistic, and wrong, to posit that the forced inclusion of additional candidates, such as Mr. Forbes, could be accommodated merely by lengthening a debate without changing the nature of the program—even assuming the other candidates would still be willing to participate in the debate.[2] A broadcaster may have

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[2] Major party candidates are often reluctant to participate in a debate with a fringe party candidate, whose appeal may be limited and whose focus may be on issues of little concern to most of the

decided, for example, that a debate between two major party candidates would best highlight the differences between them and illuminate the key campaign issues of the campaign; whereas the addition of independent candidates with widely divergent views would shift the focus of the debate to the chasm between the major party candidates and the independent candidates on issues of much less interest to the general electorate—issues such as animal rights or abolition of the income tax or the teaching of creationism in public schools. Thus, the forced inclusion of an independent candidate would result in a *different* debate, not simply a longer debate. However, the decision of which debate to air properly belongs to the broadcaster, not the court.

Asking courts to decide the kinds of disputes likely to arise if the decision below is allowed to stand will entangle them in delicate and difficult programming decisions properly left to the broadcaster. As a threshold matter, it is not clear how the Eighth Circuit's viewpoint neutral standard would be applied to such decisions. Are stations licensed to state entities barred from making any programming judgments based on the views of the candidates or other participants—even such judgments as whether a candidate's views are so far out of the mainstream that they would be of little interest to viewers? Prohibiting this kind of programming judgment would reduce the broadcast station to little more than a public access channel, contrary to the clear mandate of the Communications Act. *See, CBS v. DNC,* 412 U.S. at 105-10; *United States v. Midwest Video Inc.,* 406 U.S. 649 (1972) (plurality opinion).

Assuming that the state broadcaster retains some editorial discretion to consider viewpoints, the court then would face the intrusive task of weighing the broadcaster's

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electorate. If major party candidates were to withdraw from a debate or decline to participate, the public would be deprived of a debate on the issues of major concern to it.

motives and/or evaluating the propriety of its editorial decision. For example, was the decision to exclude a candidate motivated by antipathy to the candidate's views, or was it a legitimate programming judgment that the issue was of little concern to most viewers? And, under the decision below, the broadcaster would bear the burden of justifying its decision, rather than being given the discretion the FCC affords licensee programming decisions.[3]

The extent to whch the court's decision would impair a state broadcaster's ability to serve its community's needs should not be understated. While the Eighth Circuit's decision was rendered in the context of a candidate debate, its implications are far-reaching. As this Court and other courts of appeals have recognized, the making of content-based decisions is unavoidable in the operation of a broadcast station.[4] The production of any program entails hundreds of content-based decisions, from the initial conception of the program to its visual content and background music.

The court's reasoning could subject any of these decisions to judicial challenge. Public affairs or documentary programs in which individuals are interviewed or guests appear, or any program that addresses issues on which there are divergent views are apt targets for suit by those with opposing views. But, the production of every public affairs or documentary program requires decisions as to which viewpoints to cover, what format to utilize, which spokespersons to feature, and how much time to devote to each spokesperson and viewpoint. In every case, the excluded persons or groups are arguably "members of the class of speakers for whose benefit the program was held" and, therefore, could challenge the exclusion. In most cases, these decisions turn on content-

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[3] *Compare, e.g., National Organization for Women v. FCC,* 555 F.2d 1002, 1010-12 (D.C. Cir. 1977); *Kennedy for President Com. v. FCC,* 636 F.2d 417, 426-28 (D.C. Cir. 1980).

[4] *See* Section II *infra.*

based considerations, such as whether the subject matter is timely, interesting and relevant to its intended audience.

If the decision below is allowed to stand, courts could be asked to determine whether state broadcast licensees excluded or gave inadequate time to certain spokespersons or views, or whether they distorted those views because of antipathy to the viewpoint expressed. Courts also could be called upon to decide whether the decision not to broadcast a program obtained from another producer was based on legitimate, viewpoint-neutral considerations. *See, e.g., Muir, supra.* As this Court held in *CBS v. DNC,* the courts are not the appropriate tribunal to resolve these matters. They are best left to journalists and broadcasters: "For better or worse, editing is what editors are for; and editing is selection and choice of material." 412 U.S. at 124.

B. The Decision Below Will Deprive The Public Of Valuable Programming By Deterring State Broadcast Licensees From Presenting Programming Addressing Issues Of Public Importance.

By injecting the courts into the editorial process, the Eighth Circuit's decision will chill the programming judgment of state public broadcast licensees. These licensees may be hesitant to sponsor or broadcast debates featuring less than all the candidates for an elective office because of the risk of a lawsuit from any candidate not invited to participate. Under the decision below, such suits could be brought even where the station offered the candidate an opportunity to appear on other programs or in another debate. Moreover, the broadcaster would have no assurance that it could vindicate itself by demonstrating that its decision was based on a good faith, reasonable news judgment, as it could in an FCC proceeding under Section 315.[5] State broadcasters might also be chary of

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[5] *See AETC Petition* at 11-16. As discussed in AETC's Petition, a candidate who files a complaint under Section 315 has the burden of producing "extrinsic evidence" that the broadcaster did not act in good faith.

carrying other programs dealing with controversial issues, lest they be sued by spokespersons whose views are not included or, in the opinion of the spokesperson, receive inadequate attention.

The burden of those lawsuits on the licensee will be substantial, subjecting station management and programming personnel to discovery requests, depositions and the other distractions of litigation. Further, suits seeking injunctive relief are likely to be brought, as here, shortly before the broadcast of the program, thereby requiring the immediate attention of station personnel and creating uncertainty as to whether the program can be aired or must be restructured to satisfy the court's order. These burdens, and the attendant costs of litigation, are likely to deter numerous state licensees, which already operate under extremely tight budgetary constraints, from sponsoring and broadcasting candidate debates and the other public affairs programs they currently provide.[6]

Such self-censorship would have a profound impact on the programming that public broadcast stations make available to the American people. Public television and radio stations licensed to state instrumentalities reach approximately 24% of the American public and often provide the only public broadcasting service available in rural and remote areas. Moreover, public broadcast stations frequently provide coverage of congressional and other races that do not generate the broad interest of senatorial, gubernatorial or mayoral elections. Public broadcasters also provide in-depth public affairs and documentary coverage of topical issues that are often ignored or addressed in cursory fashion by the commercial media. The loss of

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[6] Foreseeing precisely this result in a case raising the same issues, the Eleventh Circuit stated in *Chandler, supra*, that it was "not willing to establish a precedent that would require public television stations to forego the broadcast of controversial views touching upon important public issues . . . lest the airing of such programs require the inclusion of a cacophony of different views on each subject." 917 F.2d at 489-90.

these programs will deprive the public of valuable information that is essential to an informed electorate.

In short, the decision below threatens to reduce the quality and diversity of programming and information that public broadcasting makes available to the American public. This result would be contrary to Congress' intention when it enacted the Public Broadcasting Act of 1967 and provided federal funding for the broadcast of innovative, in-depth coverage of issues of public importance and of other noncommercial programming responsive to the diverse needs and interests of viewers across the nation.[7] Whether the First Amendment requires this perverse result is an issue worthy of this Court's consideration.

II. BY RECOGNIZING A FIRST AMENDMENT RIGHT OF ACCESS TO STATE BROADCAST STATIONS, THE DECISION BELOW DEPARTS FROM THE DECISIONS OF THIS COURT AND EVERY OTHER COURT OF APPEALS THAT HAS ADDRESSED THE ISSUE.

The Eighth Circuit's conclusion that Mr. Forbes had a "qualified right of access" to the debate sponsored by AETC cannot be squared with this Court's seminal de-

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[7] The Report of the Carnegie Commission on Educational Television, which formed the basis for the Public Broadcasting Act of 1967, noted that commercial television's reliance on advertising constrains its coverage of controversial issues. However, an adequately funded public television system, free of commercial imperatives, could "be a forum for debate and controvery" and a source of programs that "can help us see America whole, in all its diversity." The Carnegie Commission on Educational Television, *Public Television: A Program for Action*, 96-97 (1967) (Bantam Books). The Senate Report on the Public Broadcasting Act of 1967 echoed that view, indicating "[p]articularly in the area of public affairs . . . noncommercial educational broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967).

cision in *CBS v. DNC* or with the decisions of every other court of appeals that has addressed the issue.[8] In each of those cases, the court recognized that a right of access is fundamentally inconsistent with the editorial discretion essential to the operation of a broadcast station and to the provision of a meaningful program service.[9]

In *CBS v. DNC,* this Court held that the First Amendment does not create a right to access to broadcast stations. After reviewing the history and structure of the Communications Act, this Court concluded that Congress has established a detailed regulatory regime in which broadcast licensees are responsible for operating in the public interest and have broad editorial discretion to determinate how best to fulfill that mandate, subject only to oversight by the FCC to determine whether licensees are fulfilling their statutory obligations. *CBS v. DNC,* 412 U.S. at 103-113, 121-125.

This Court reasoned that creating a right of access would be inconsistent with the statutory scheme and would result in an

> erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from licensees who are accountable for broadcast performance to private individuals who are not. The public

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[8] *See, Chandler v. Georgia Public Telecommunications Commission, supra; Schneider v. Indian River Community College Foundation, Inc.,* 875 F.2d 1537 (11th Cir. 1989); *Muir v. Alabama Educational Television Commission, supra. Cf. Johnson v. FCC,* 829 F.2d 157 (D.C. Cir. 1987); *Belluso v. Turner Communications Corp.,* 633 F.2d 393 (5th Cir. 1980).

[9] *See, League of Women Voters of California v. FCC,* 468 U.S. 364, 378 (1984) ("if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust").

> interest would no longer be "paramount" but, rather, subordinate to private whim . . .

412 U.S. at 124. Thus, the Court held that:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.

Id. at 102. Given the framework of the Communications Act, the Court concluded that the broadcast licensee is the entity that must make the editorial decisions as to what to broadcast.

The analysis in *CBS v. DNC* has been consistently followed and applied to state broadcast licensees by the courts of appeals, including a panel of the Eighth Circuit. In *DeYoung v. Patten,* 898 F.2d 628 (8th Cir. 1990), a panel of the Eighth Circuit held that *Amicus* Iowa PTV was not required to invite a minor party candidate to participate in a candidate debate broadcast by Iowa PTV. The panel found that, because Iowa PTV did "not allow anyone, even political candidates, to appear on its broadcasts or programs at any time," it had not created a public forum to which candidates or others had a right of access. *Id.* at 633. Although Iowa PTV provided time for public discourse, the court reasoned that "the nature and purpose of the forum is not compatible with unrestricted public access, or even with unrestricted access by a particular class of speakers." *Id.* Consequently, it concluded that the First Amendment created no greater right of access to state broadcast stations than that conferred by Section 315.

In *Chandler v. Georgia Public Telecommunications Commission, supra,* the Eleventh Circuit reached a similar result. It concluded that the Georgia Public Telecommunications Commission ("GPTC"), an agency of the State of Georgia,

> is not such a medium [open to all]. GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." . . . [A]s a public television station, GPTC is under an obligation to serve the public interest . . . [and] GPTC's employees make editorial decisions on a daily basis determining which programs to air . . . . Obviously a decision to broadcast one program excludes, for that time, all other programs . . . . GPTC "regulated content" by making a decision to air debates between candidates of the major parties. . . . [T]his content-based decision is not viewpoint restrictive and does not violate the First Amendment . . . . GPTC makes content-based decisions on a regular basis in order to serve Georgians. A decision to air any show is necessarily content-based.

917 F.2d at 488-89 (footnotes omitted). Accordingly, the court denied Chandler's First Amendment request to be included in a candidate debate sponsored by GPTC.

And, in *Muir v. Alabama Educational Television Commission, supra,* the Fifth Circuit held that the First Amendment did not prevent a state public broadcasting network from deciding not to broadcast a particular program, even though that decision was content-based. Rejecting a public forum mode of analysis, the court reasoned:

> The pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered.

688 F.2d at 1042 (footnote omitted). Thus, it denied viewers' claims that their First Amendment rights were violated by the decision of the Alabama Commission not to broadcast the program "Death of a Princess." *See also, Schneider v. Indian River Community College Foundation, Inc., supra.*

The Eighth Circuit's departure from these decisions creates a split in the circuits that can be resolved only by this Court. The decision below wll adversely affect the programming carried not only by AETC, but also by the state public broadcasting networks in Iowa and Nebraska, *Amici* here. It also will have a chilling effect on state broadcast stations outside the Eighth Circuit, which justifiably will be concerned that they may face lawsuits similar to that filed by Mr. Forbes if they do not invite fringe party candidates to participate in debates. In short, the decision strikes at the editorial core of the public broadcast system, severely circumscribing, if not eliminating, the editorial freedom of a major portion of the nation's public radio and television stations.

III. THE COURT BELOW SHOULD HAVE REQUIRED MR. FORBES TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

In its Petition for Rehearing of the decision below, AETC argued that, in light of the pervasive nature of the regulations governing access by candidates to broadcast stations, the court should have required Mr. Forbes to exhaust his remedies at the FCC, as the dissenting judges urged. The court summarily denied that Petition. In so doing, the court (a) ignored this Court's admonition in *CBS v. DNC* that First Amendment issues in the broadcast arena should be resolved within the framework of the Communications Act, and (b) created a new standard and set of procedures—different from those applicable to other broadcasters—for determining whether candidates have the right to use broadcast stations licensed to state instrumentalities.

In enacting Section 315 and Section 312(a)(7) of the Communications Act, Congress established detailed rules governing a candidate's right to access broadcast facilities. Those rules carefully balance the competing First Amendment interests of candidates, the public and broadcasters. This Court and the courts of appeals have consistently held that First Amendment claims for access to the broadcast medium must be analyzed in the context of this elaborate regulatory system:

> The broadcasting industry stands in a unique relationship to the First Amendment; its tremendous power to inform and shape public opinion and the immutable scarcity of broadcast frequencies have created both tremendous opportunities and serious hazards for free expression. . . .
>
> While the [Supreme] Court acknowledged that it could not "defer" to the judgment of Congress or the Commission on a constitutional question, it realized that contests over access oftimes present complex problems and few known answers, and that courts ought to pay careful attention to how the other branches of government have treated the same problem. . . . There is . . . a particularly strong obligation to consider petitioners' claim of a right of access to the broadcast media against the backdrop of the balance of First Amendment interests embodied in the Communications Act. . . .

Johnson v. FCC, 829 F.2d at 160-61.

The Eighth Circuit ignored these teachings when it reached the First Amendment issue asserted by Mr. Forbes and did not require him to exhaust his administrative remedies. While the courts are the ultimate arbiters of constitutional issues, expert administrative agencies can make significant contributions to the proper resolution of those issues. Agency consideration of constitutional claims provides the courts with the benefit of the agency's expertise and a fully developed exploration of relevant policy considerations and available statutory remedies.

Accordingly, the courts have regularly required parties to exhaust administrative remedies even when constitutional rights were asserted. *See, e.g., Aircraft & Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752, 772 (1947); *Alliance for Community Media v. FCC,* 10 F.3d 812, 830-31 (D.C. Cir. 1993); *Harmon v. Thornburgh,* 878 F.2d 484 (D.C. Cir. 1989), *cert. denied sub nom. Bell v. Thornburgh,* 493 U.S. 1056 (1990); *Meredith Corp. v. FCC,* 809 F.2d 863 (D.C. Cir. 1987); *Wallace v. Lynn,* 507 F.2d 1186, 1190-91 (D.C. Cir. 1974).

Requiring exhaustion of administrative remedies is particularly appropriate in this case because the factors the FCC would consider under Section 315 are closely related to the issues that the district court would consider on remand from the decision below.[10] Under Section 315, candidate debates are exempt from the equal opportunities provision of Section 315, but only if the decision to broadcast the debate is based on the licensee's good faith judgment that the program is newsworthy.[11]

While the test under Section 315 for determining whether a candidate's access to a broadcaster's facilities may not be identical to the test for determining a candidate's right of access under the First Amendment, the Commission should have been given the opportunity to consider the First Amendment question before the court reached that issue. Resolution of whether a broadcaster exercised good faith news judgment clearly would be relevant to the First Amendment issue, even if the proper

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[10] *Cf. FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 795 (1978) (the public interest standard of the Communications Act necessarily invites the Commission to consider First Amendment principles).

[11] *E.g., Kennedy for President Com. v. FCC,* 636 F.2d 417, 425-27 (D.C. Cir. 1980); *Chisholm v. FCC,* 538 F.2d 349, 359-60 (D.C. Cir.), *aff'g sub nom. Aspen Institute Program on Communications & Society,* 55 F.C.C.2d 697 (1976), *cert. denied sub nom. Democratic National Committee v. FCC,* 429 U.S. 890 (1976); *King Broadcasting Co.,* 6 FCC Rcd 4998, 4999 (1991).

test were, as the court below concluded, a viewpoint-neutral standard.[12]

Moreover, the Commission's determination of whether the debate was exempt under Section 315, as well as its resolution of Mr. Forbes' rights under Section 312(a)(7) of the Communications Act,[13] could have materially altered the factual posture of this case. For example, if the Commission had found that the debate was not exempt or if the Commission had ordered AETC to provide access to Mr. Forbes under Section 312(a)(7), the constitutional issues would have been presented in a different context and potentially different issues would have been posed. Consequently, by not requiring Mr. Forbes to exhaust his administrative remedies, the court below reached a constitutional issue it might have been able to avoid.[14] This Court has consistently held that federal courts should not decide a constitutional question if there is some other ground upon which to dispose of the case, or until the issue is properly presented by the record.[15] The Eighth Circuit did not heed that admonition when it reached the constitutional issue and did not require Mr. Forbes to exhaust his administrative remedies.

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[12] For example, a debate is not exempt from the equal opportunities requirement if the licensee broadcasts it for the purpose of promoting or impeding the election of any candidate. *Chisholm v. FCC*, 538 F.2d at 366; *Arthur R. Block*, 7 FCC Rcd 1784, 1785 (1992); *Aspen Institute*, 55 F.C.C.2d at 707.

[13] 47 U.S.C. § 312(a)(7). Section 312(a)(7) affords candidates for federal elective office the right to obtain reasonable access to the facilities of broadcast stations. *See, Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367 (1981).

[14] That clearly is the case to the extent that the First Amendment imposes no greater burden on state broadcast licensees than Section 315 and Section 312(a)(7).

[15] *See, e.g., Escambia County v. McMillan*, 466 U.S. 48 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

By ignoring the statutory framework of the Communications Act and the admonitions of this Court to resolve First Amendment issues with reference to that framework, the court below prematurely reached a constitutional issue and created new procedural and substantive rights for political candidates seeking access to state broadcast stations that allow candidates to by-pass the agency created by Congress to address those very matters. The Court should determine whether the First Amendment requires such a result.[16]

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[16] This issue is ripe for consideration by this Court at this juncture in this proceeding. The issue is a straightforward legal issue which was fully explored by the court below and which does not require any factual findings by the district court. Moreover, unless the Eighth Circuit's decision is reversed, it will have a chilling effect not only on state licensees within the Eighth Circuit, such as *Amici* Iowa PTV and NETC, but also on other state broadcasters which will be concerned that the precedent will be applied to them. Furthermore, if AETC should prevail on remand, the issue will escape this Court's review, and the Eighth Circuit's decision will continue to chill the editorial discretion of state broadcasters.

CONCLUSION

For the reasons set forth above and in AETC's Petition for Certiorari, the *Amici Curiae* urge this Court to grant AETC's Petition.

Respectfully submitted,

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